Remarks/Arguments:

Claims 1 and 3-15 are pending in the above-identified application. Claim 2 has been cancelled.

Claims 1 and 3 were rejected under 35 U.S.C. § 103(a) as being obvious in view of Dinwiddie et al. and Kraml et al. and Open Cable™ Host-Pod Interface Specification. Applicant respectfully requests reconsideration of this rejection.

With regard to claim 1, neither Dinwiddie et al., Kraml et al., Open Cable™ Host-Pod Interface Specification, nor their combination disclose or suggest,

> ... determining if the smart card is a point of deployment (POD) card;
>
> if the smart card is a POD card, initializing the POD card;
>
> **if the smart card is not a POD card, determining if the smart card is a software upgrade card** by recognizing, in the host device, the smart card as including the upgraded software by accessing a cable television card information structure (CIS) of the smart card and locating a tuple in the cable television CIS which identifies the smart card as upgraded software ... (Emphasis added).

Basis for this amendment may be found, for example, in the specification at paragraph [0045].

The Examiner admits that neither Dinwiddie et al. or Kraml et al. disclose accessing a "...CIS of the smart card and locating a tuple in the cable television CIS which identifies the smart card as upgraded software," as recited in claim 1. (Office Action, page 4, lines 9-11). The Examiner argues, however, Open Cable™ Host-Pod Interface Specification discloses these features.

Open Cable™ Host-Pod Interface Specification discloses, however, **reading a CIS for identifying a POD**. (Pages 18-19). The SCTE POD module CIS requires a minimum set of tuples shown in Table 5.3 at page 19 for identifying the POD. Open Cable™ Host-Pod Interface Specification does not disclose determining whether the smart card is a POD card or a software upgrade card and locating a tuple in the CIS of the smart card to determine if the smart card is a software upgrade card. That is, Open Cable™ Host-Pod Interface Specification does not disclose "... **if the smart card is not a POD card, determining if the smart card is a**

software upgrade card by recognizing, in the host device, the smart card as including the upgraded software by accessing a cable television card information structure (CIS) of the smart card and locating a tuple in the cable television CIS which identifies the smart card as upgraded software," as recited in claim 1.

Applicant's exemplary embodiment includes a CIS tuple which designates a smart card 25 as a software upgrade, and not for identifying the smart card 35 as a POD. (Para. [0043]). According to the exemplary embodiment of your invention, if the smart card 25 is identified as a POD, the POD is initialized. If the card 25 is recognized as a software upgrade, however, the new software is read from the memory of the smart card 25. (Para. [0045]).

Because neither Dinwiddie et al., Kraml et al., Open Cable™ Host-Pod Interface Specification, nor their combination disclose or suggest the features of claim 1, claim 1 is not subject to rejection under 35 U.S.C. § 103(a) in view of Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification. Claim 3 depends from claim 1. Accordingly, claim 3 is also not subject to rejection under 35 U.S.C. § 103(a) in view of Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification.

Claims 4-8 were rejected under 35 U.S.C. § 103(a) as being unpatentable in view of Dinwiddie et al., Kraml et al., Open Cable™ Host-Pod Interface Specification, Metz et al. and Kidder et al. Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification are described above. Metz et al. and Kidder et al. are described in the previous response. Metz et al. and Kidder et al. also do not disclose or suggest accessing a CIS and locating a tuple in the CIS. Thus, Metz et al. and Kidder et al. do not disclose "... if the smart card is not a POD card, determining if the smart card is a software upgrade card by recognizing, in the host device, the smart card as including the upgraded software by accessing a cable television card information structure (CIS) of the smart card and locating a tuple in the cable television CIS which identifies the smart card as upgraded software," as recited in claim 1.

Because neither Dinwiddie et al., Kraml et al., Open Cable™ Host-Pod Interface Specification, Metz et al., Kidder et al., nor their combination disclose or suggest the features of claim 1, claim 1 is not subject to rejection under 35 U.S.C. § 103(a) in view of Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification, Metz et al. and Kidder et al. Claim 4 depends from claim 1. Accordingly, claim 4 is also not subject to rejection under 35

U.S.C. § 103(a) in view of Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification, Metz et al. and Kidder et al.

With regard to claim 5, neither Dinwiddie et al., Kraml et al., Open Cable™ Host-Pod Interface Specification, Metz et al., Kidder et al., nor their combination disclose or suggest, "a cable television card information structure (CIS) having **a tuple for identifying the smart card as a code upgrade card** while the host device is operating.' Dinwiddie et al., Kraml et al., Metz et al., Kidder et al. are described above. Open Cable™ Host-Pod Interface Specification discloses **reading a CIS for identifying a POD**. Open Cable™ Host-Pod Interface Specification does not disclose reading a CIS for identifying **a code upgrade card**. That is, Open Cable™ Host-Pod Interface Specification does not disclose "a cable television card information structure (CIS) having **a tuple for identifying the smart card as a code upgrade card**," as recited in claim 5.

Furthermore, the only suggestion to combine these references comes from applicant's own disclosure. In the Office Action it is stated that "[a]t the time of the invention it would have been obvious for one of ordinary skill in the art to use the CIS taught by the OpenCable Spec in the method disclosed by Dinwiddie and Kraml. The motivation would have been to used the documented PCMCIA standard to save on development costs and allow for the device to work with other devices built within the OpenCable specification."

There are at least two problems with this statement. First, there is no indication as to how the OpenCable spec would be applied. This spec defines only the use of POD tuples in the CIS. It does not allow for any other tuples in the CIS. There is no indication in the Office Action as to how the non-POD tuples would be handled. As set forth in MPEP §2143.01 (III), "[t]he mere fact that references can be combined or modified does not render the resultant combination obvious unless the results would have been predictable to one of ordinary skill in the art." Here, there has been no finding as to the level of skill of the person of ordinary skill in the art or any showing as to how that person would modify the OpenCable standard and the Dinwiddie and Kraml patents to meet the claim limitations.

Second, the statement is made based on evidence gleaned from Applicant's specification. As set forth in MPEP §2145, this is improper:

> Applicants may argue that the examiner's conclusion of obviousness is based on improper hindsight reasoning. However, "[a]ny judgement (sic) on

> obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper." (emphasis added)

The examiner has provided no basis for combining these references other than that which he has "gleaned from Applicant's disclosure." Accordingly, the combination is improper.

Because neither Dinwiddie et al., Kraml et al., Open Cable™ Host-Pod Interface Specification, Metz et al., Kidder et al., nor their combination disclose or suggest the features of claim 5, claim 5 is not subject to rejection under 35 U.S.C. § 103(a) in view of Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification, Metz et al. and Kidder et al. Claims 6-8 depend from claim 5. Accordingly, claims 6-8 are also not subject to rejection under 35 U.S.C. § 103(a) in view of Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification, Metz et al. and Kidder et al.

Claims 9-13 and 15 were rejected under 35 U.S.C. § 103(a) as being unpatentable in view of Metz et al., Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification. Metz et al., Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification are described above.

With regard to claims 9, 13 and 15, these claims, while not identical to claim 1, include features similar to those set forth above with regard to claim 1. Thus, claims 9, 13 and 15 are also not subject to rejection for the same reasons as those set forth above with regard to claim 1. Claims 10-12 depend from claim 9. Accordingly, claims 10-12 are also not subject to rejection under 35 U.S.C. § 103(a) as being unpatentable in view of Metz et al., Dinwiddie et al., Kraml et al. and Open Cable™ Host-Pod Interface Specification.

Claim 14 was rejected under 35 U.S.C. § 103(a) as being unpatentable in view of Metz et al., Dinwiddie et al., Kraml et al., Open Cable™ Host-Pod Interface Specification and Kidder. These references are described above. Neither Metz et al., Dinwiddie et al., Kraml et al., Open Cable™ Host-Pod Interface Specification, Kidder, nor their combination disclose the features of claim 13. Claim 14 depends from claim 13. Accordingly, claim 14 is also not subject to rejection under 35 U.S.C. § 103(a) as being unpatentable in view of Metz et al., Dinwiddie et al., Kraml et al., Open Cable™ Host-Pod Interface Specification and Kidder.

In view of the foregoing amendments and remarks, Applicants request that the Examiner reconsider and withdraw the rejection of claims 1 and 3-15.

Respectfully submitted,

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